

# Safeguarding Environmental Rights in Kenya

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## Abstract

The lack of a constitutional guarantee to a clean and healthy environment was widely seen as the main setback towards achieving an integrative and harmonious policy and legal framework for sound environmental management in Kenya. The clamour for an integrated framework resulted in the enactment of the Environmental Management and Co-ordination Act<sup>1</sup> and more recently the Constitution.<sup>2</sup> This paper appraises the constitutional basis of environmental rights in ensuring that they are observed, respected, protected, promoted and fulfilled. The scope of the right to a clean and healthy environment will be examined. Equally the authors examine the efficacy and the role of procedural rights such as access to information, access to justice and public participation in decision-making in the promotion, protection and fulfillment of environmental rights. The enhanced role of the courts under the constitution in promoting and safeguarding environmental rights through their judgments, declarations and other reliefs that they may grant to litigants will also be discussed. The authors argue that by having the right to a clean and healthy environment and other procedural rights as constitutional rights and by enhancing the role of the courts environmental rights will be more safeguarded.

The paper proceeds in four parts. Part 1.0 is the introduction. Part 2.0 addresses environmental rights in the constitution. It discusses the right to a clean and healthy environment and its scope; economic and social rights; procedural rights; the right to

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<sup>1</sup> Act No. 8 of 1999, *Government Printer, Nairobi*

<sup>2</sup> Constitution of Kenya 2010, op. cit

life and environmental protection measures. Part 3.0 examines the challenges and opportunities in realizing the right to a clean and healthy environment. The conclusion is in Part 4.0.

## **1.0 Introduction**

For a long time Kenya did not have an integrated, an inbuilt and harmonious legal framework explicitly providing for environmental governance. What we have had are sectoral laws tackling specific aspects of the environment. The sectoral approach did not augur well in protecting and conserving the environment as certain aspects of the environment were ignored. The sectoral laws also failed to passably address the rights of the individuals to a clean, decent, satisfactory and healthy environment; the role of the State in environmental conservation and protection; and the right of the environment to be protected for its intrinsic and ecological worth. The inherent shortcomings in the sectoral laws resulted in the enactment of the Environmental Management and Coordination Act<sup>3</sup> as the main legal and administrative framework to harmonize the diverse sectoral initiatives and improve the national capacity for environmental management in Kenya. Under section 3 (1) of the said Act every person is entitled to a clean and healthy environment and has a duty to safeguard and enhance the environment. The Act also did away with the legal question as to *locus standi* which had been a major drawback in public interest litigation and more so in environmental disputes.<sup>4</sup> Standing to sue could thus be invoked by the courts to defeat public interest claims in Kenya as was the case in *Maathai v. Kenya Media Trust Limited*.<sup>5</sup> The Act was thus seen as a major step by the State in efforts towards observing, respecting, protecting, promoting and fulfilling environmental rights in Kenya. Even though the Act contained provisions that if given a broad and liberal interpretation would lead to

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<sup>3</sup> Act No. 8 of 1999, op.cit.

<sup>4</sup> Ibid, Section 3 (4).

<sup>5</sup> See *Maathai v. Kenya Media Trust Limited* Civil Case 5403 of 1989; where the court opined that the Plaintiff had no right of action against the Defendant Company and hence she had no locus standi.

increased environmental protection there was still agitation for a right to a clean and healthy environment built in the constitution. Environmental law scholars such as Okidi argued that advocates of environmental protection were invariably seeking for the constitutionalisation of environmental rights so as to rely on the force of the constitution in environmental protection.<sup>6</sup> These efforts resulted in the enactment of the constitution of Kenya 2010.<sup>7</sup>

The right to a clean and healthy environment is now firmly embedded in the constitution and is not just a statutory right as it previously existed under the Act.<sup>8</sup> Greater protection to environmental rights is now guaranteed and further enhanced by mechanisms for enforcement by allowing every person access to justice through public interest litigation and by assigning courts special roles in protecting environmental rights.<sup>9</sup> Boyd says that the constitutionalisation of the right to a clean and healthy environment may result in or contribute to a broad range of legal and extra legal actions that will enhance environmental protection. This is by providing impetus for stronger environmental legislation; bolstering the implementation and enforcement of existing environmental laws and policies; filling gaps in environmental legislation; strengthening democracy by promoting great public participation, access to justice and information; protection of vulnerable groups including future generations; educating citizens, judges, politicians and civil servants about the urgent need to protect the

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<sup>6</sup> Okidi. C.O., "Concept, Function and Structure of Environmental Law", in C.O Okidi, P. Kameri - Mbote and Migai Aketch (eds.), *Environmental Governance in Kenya; Implementing the Framework Law*, (East African Educational Publishers, 2008),pp. 142-182: 146; See also David R. Boyd, *"The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment"*, (UBC Press, University of British Columbia)

<sup>7</sup> Constitution of Kenya 2010, op.cit

<sup>8</sup> Ibid., Article 42

<sup>9</sup> See generally the Environment and Land Court, Act No. 11 of 2011.

environment; setting environmental rights above the vicissitudes of everyday politics and by fostering accountability on the part of the government.<sup>10</sup>

## **2.0 Environmental Rights in the Constitution:**

There is a diverse array of provisions on environmental protection in the constitution. Some address environmental issues explicitly while others are implicit. The express ones include for example the right to a clean and healthy environment in Articles 42, 60, 69 and 70 of the Constitution. The implicit ones include for example, the right to life<sup>11</sup>; the economic and social rights entitling every person *inter alia* the right to the highest attainable standard of health, freedom from hunger, to have adequate food of acceptable quality and to clean and safe water in adequate quantities<sup>12</sup>; the protection of the right to property<sup>13</sup>; protection of the rights of minorities and marginalized groups amongst others<sup>14</sup>. This is unlike in the former constitution where such rights were not part of the fundamental rights.

### **2.1 The right to a clean and healthy environment**

This right is provided for in Article 42 of the constitution which states that every person has the right to a clean and healthy environment which includes the right to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69 and also to have obligations relating to the environment fulfilled under Article 70. Article 69 outlines the obligations of the State in respect of the environment and the measures the State shall undertake in protecting and conserving the environment. Article 69 (2) obligates every person to cooperate with the State organs and other

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<sup>10</sup> David R. Boyd, *"The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment"*, op.cit.

<sup>11</sup> Article 26 of the Constitution, op.cit

<sup>12</sup> Ibid., Article 43

<sup>13</sup> Ibid., Article 40

<sup>14</sup> Ibid., Article 56

persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources. In enforcing environmental rights, Article 70 (1) provides that one may apply to court for redress if the right to a clean and healthy environment under Article 42 has been, is being or is likely to be denied, violated, infringed or threatened. Article 70 (1) thus gives every Kenyan access to a court of law to seek redress in environmental matters. Even the stringent legal requirement as to *locus standi* which had hitherto been a major setback in seeking environmental justice has been done away with. Article 70 (3) thereof provides that an applicant does not have to demonstrate that any person has incurred loss or suffered injury.

## **2.2 Scope of the right to a clean and healthy environment**

The scope of the right to a clean and healthy environment as envisaged in the constitution is wide-ranging as impacting heavily on the realization of many other rights. This is not surprising in view of the fact that environmental rights have incessantly refused to fit neatly into the long-established tradition of classifying human rights into 'generations'<sup>15</sup>. Therefore, they straddle all of the said categories of human rights<sup>16</sup> and at times the right to life, and economic and social rights have been interpreted such as to advance the need for environmental protection. In the constitution the right to a clean and healthy environment thus includes many other components such as elimination of all forms of air, water and land pollution<sup>17</sup>, access to clean and safe water, food security, freedom from elements that threaten human health<sup>18</sup>, the right to access justice<sup>19</sup>, right to opportunities to participate in

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<sup>15</sup> There are first generation rights [*civil and political rights*], second generation rights [*economic, social and cultural rights*] and third generation rights [*solidarity, collective or group rights*].

<sup>16</sup> See generally, Patricia Birnie & Alan Boyle, *International Law and the Environment*, 2<sup>nd</sup> ed. (Oxford: Oxford University Press, 2002), Chapter 5; and Phillipe Cullet, "Definition of an Environmental Right in a Human Rights Context", *HeinOnline – 13 Neth. Q. Hum.Rights*.29 1995.

<sup>17</sup> See Article 69 of the Constitution., op.cit

<sup>18</sup> *Ibid.*, Article 43

<sup>19</sup> *Ibid.*, Articles 48 and 159.

environmental decision-making processes<sup>20</sup> and access to information.<sup>21</sup> Due to its wide scope courts will be required to provide an expanded definition of the right to a clean and healthy environment. In the *Ugandan case of Uganda Electricity Transmission Co. Ltd v. De Samaline Incorporation Ltd* <sup>22</sup>a wide definition of this right in the following terms;

*“I must begin by stating that the right to a clean and healthy environment must not only be regarded as a purely medical matter. it should be regarded as a holistic social-cultural phenomenon because it is concerned with physical and mental well-being of human beings...a clean and healthy environment is measured in both ethical and medical context. It is about linkages in human well-being. These may include social injustice, poverty, diminishing self-esteem. And poor access to health services. That right is not restricted to a clinical model.”*

Judicial commitment and dedication in developing environmental jurisprudence will be crucial in generating novel, broad and wide interpretations to the right to a clean and healthy environment that address all aspects of the human being.

### **2.3 Economic and Social Rights**

Environmental rights and economic and social rights are entwined. Economic and social rights include the right to health, access to adequate housing and reasonable standards of sanitation, freedom from hunger, to have adequate food, to clean and safe water, social security and education.<sup>23</sup> Article 21 (2) enjoins the State to pursue legislative, policy and other measures including the setting of standards to achieve the progressive realization of the economic and social rights under Article 43 to enable

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<sup>20</sup> Ibid., Article 69 (1) (d)

<sup>21</sup> Ibid., Article 35

<sup>22</sup> Misc. Cause No. 181 of 2004 [High Court of Uganda]; See discussion in B. Kiromba Twinomugisha, “Some Reflections on Judicial Protection of the Right to a Clean and Healthy Environment in Uganda” *Law Environment and Development Journal*, Vol.3/3.

<sup>23</sup> Article 43., op. cit

individuals and groups to develop equally to their full potential by providing the necessary conditions of life.<sup>24</sup>

Cases that have been decided recently show that courts are embracing their role as the guardians of fundamental rights and freedoms. In *Musa Mohammed Dagane & 25 others v Attorney General & Another*,<sup>25</sup> the High Court of Kenya at Embu in holding that the petitioners were entitled to compensation and redress for their grievances observed that, “...the State has a constitutional obligation towards the applicants. The State must provide services to the applicants in a sustainable manner to promote social and economic development and encourage the growth and the sustenance of basic rights. The State also must respect, protect, promote and fulfill the basic rights enshrined in our constitution to ensure there is no violation or encroachment on the said rights on any entity or organ of the State. By evicting the applicants from their ancestral home, the respondents engaged in acts and in a manner that is broadly at odds with the spirit and purpose of constitutional obligations.” It is thus evident that the realization of the economic and social rights will largely depend on the quality of the environment which is a basic condition of life, indispensable to the promotion of human dignity, welfare and the fulfillment of other human rights.<sup>26</sup>

#### **2.4 Role of procedural rights**

A right to a clean and healthy environment will further be enhanced by procedural rights<sup>27</sup> which are now enshrined in the constitution. The procedural rights outlined in the constitution include access to information<sup>28</sup>, public participation<sup>29</sup> and

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<sup>24</sup> Article 21 (2), op.cit

<sup>25</sup> Constitutional Petition No. 56 of 2009 eKLR [Unreported]

<sup>26</sup> Patricia Birnie & Alan Boyle, *International Law and the Environment*, op.cit; See also Philippe Sands, *Principles of International Environmental Law*, 2<sup>nd</sup> ed. (Cambridge: Cambridge University Press, 2003) and Phillippe Cullet, “Definition of an Environmental Right in a Human Rights Context”, op.cit.

<sup>27</sup> Principle 10 of the Rio Declaration on Environment and Development 1992, A/CONF.151/26 (Vol. I)

<sup>28</sup> See Article 35 of the Constitution, op.cit. Article 35 gives every person the right of access to information held by the State and any other person and required for the exercise or protection of any right or fundamental freedom.

<sup>29</sup> Ibid, Articles 69 (1) (d) and 60 (1) (g).

access to justice.<sup>30</sup> These procedural rights are more pragmatic, efficacious and flexible tools in realizing environmental justice. This is in contradistinction to a mere substantive right such as the right to a clean and healthy environment which in the absence of the requisite supportive infrastructure may be seen as a mere platitude. By making environmental information widely available to the citizenry and involving the public in decision-making it will be easier to move to court and seek protection of environmental rights through the prescribed avenues.

Procedural rights enhance accountability and transparency in decision-making by the policy makers and afford protection to minorities and the marginalized groups who are the most adversely affected groups by environmental harm.<sup>31</sup> One may thus hold the government accountable for failing to protect their right to a clean and healthy environment; if there is failure to avail requisite information; if one is denied an opportunity to participate in environmental decision-making processes and if one is denied access to courts for an environmental harm. Therefore, the role of procedural rights cannot be gainsaid in the environmental context. In *Musa Mohammed Dagane & 25 others supra* procedural rights were at focus, the court observing that the petitioners had not been granted an opportunity for genuine consultation, there was no adequate and reasonable notice prior to the scheduled date of eviction and no alternative land or housing was made available in reasonable time to all those affected. There was also no representation from an independent organization or the applicants during the forcible eviction to avoid casualties and claims of illegality or provision of legal remedies made available to the applicants. The court also observed that the applicants were also not granted legal aid in order for them to seek legal redress from the court, and there was no evidence that their consent was sought before the action.

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<sup>30</sup> Ibid, Articles 48 and 159.

<sup>31</sup> Ibid, Article 56 which enjoins the State to ensure the participation and representation of the minorities and marginalized groups in governance and other spheres of life.



There is a need for the passage of an Access to Information Act to give full effect to Article 35 of the Constitution. Such an Act would not only avail vital information to the public so as to make informed decisions but would also enhance transparency and accountability in governmental for acts and omissions that are deleterious to the environment.<sup>32</sup> Public participation in environmental decisions could be realized through consultations with those affected by a decision; Environmental Impact Assessments (EIA), Environmental Audits (EA) and Environmental Monitoring to enable them make informed decisions.

### **2.5 The Right to Life**

The right to life is the other substantive right in our constitution that has been used in protecting the environment<sup>33</sup>. Environmental pollution and deterioration and the production of toxic gases, wastes and other harmful substances threaten the very existence of life on earth for both the present and future generations. All human rights are interrelated and therefore, since environmental rights straddle the three 'generations' of rights<sup>34</sup> it is arguable that the right to life under Article 26 will be threatened if the measures contemplated under Article 69 are not fulfilled<sup>35</sup>. The right to life has been judicially applied by the Kenyan courts in the context of sustainable development. In *Peter K. Waweru versus Republic*<sup>36</sup> the court in adopting a liberal interpretation of section 71 of the constitution on the right to life observed that the right to life is not just a matter of keeping the body and soul together since in this modern

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<sup>32</sup> See generally, Access to Information Act, Act No. 6 of 2005, *Government Printer*, Entebbe

<sup>33</sup> Article 26 (1) of the Constitution, op.cit which provides *inter alia* that every person has the right to life which begins at conception and that a person shall not be deprived of life intentionally, except to the extent authorized by the Constitution or other written law.

<sup>34</sup> See generally, Patricia Birnie & Alan Boyle, *International Law and the Environment*, op.cit, Chapter 5; and Phillippe Cullet, "Definition of an Environmental Right in a Human Rights Context", op.cit.

<sup>35</sup> Ibid., these measures include those in Article 69 (1) (g) requiring the State to eliminate processes that are likely to endanger the environment and Article 69 (1) (f) requiring the establishment of systems of environmental impact assessment, environmental audit and monitoring of the environment.

<sup>36</sup> [2006]eKLR

age the right could be threatened by many things including the environment. The court in finding that a development that threatens life is not sustainable and ought to be halted observed that in environmental law life must have an expanded meaning as a matter of necessity. Other jurisdictions such as India have gone a step further equating the right to a clean environment with the right to life.<sup>37</sup>In view of the foregoing it is apt to postulate that effective enforcement of the right to a clean and healthy environment requires the judiciary to be more proactive in environmental disputes and in certain instances to exercise suo motto jurisdiction.

## **2.6 Environmental Protection: The Prevention and Precautionary Principles**

A further way of guaranteeing the right to a clean and healthy environment is through the application of preventive and precautionary measures as outlined in the constitution<sup>38</sup> and other international instruments. These principles have been accepted as part of the general rules of international law and thus form part of the Kenyan law by virtue of Article 2 (5) and (6) of the constitution. Principle 15 of the Rio Declaration provides in part that, *“In order to protect the environment, the precautionary principle shall be widely applied by states according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation.”* Underlying the precautionary principle is the element of anticipation and preparedness to counter environmental harm by taking effective measures. This point was clearly set out in Paragraph 7 of the 1990 Bergen Ministerial Declaration on Sustainable Development in the ECE Region in the following terms:

*“In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage,*

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<sup>37</sup> See Bakshi Pradeep & Yadav Madhur, *New Judicial Roles and Green Courts in India*, available at: [http://inece.org/conference/9/papers/Bakshi\\_India\\_Final.pdf](http://inece.org/conference/9/papers/Bakshi_India_Final.pdf) (Accessed on 03/02/2011).

<sup>38</sup> See generally Article 69 of the Constitution, op.cit

*lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation*"<sup>39</sup>.

The preventive principle requires action to be taken at an early stage before damage has actually occurred so as to reduce, limit or control activities likely to cause or risk damage to the environment by means of appropriate policy, legal, administrative and other measures.<sup>40</sup> In the *Gabcikovo-Nagymaros* case the ICJ noted that it was "*mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage.*"<sup>41</sup>

The constitution obligates the State to *inter alia* conserve the environment, work to achieve and maintain a tree cover of at least ten percent of the land area of Kenya, protect indigenous knowledge of biodiversity and the genetic resources of the communities, protect genetic resources and biological diversity, eliminate processes and activities that are likely to endanger the environment and establish systems of Environmental Impact Assessment (EIA), Environmental Audit (EA) and monitoring of the environment.<sup>42</sup> These measures are long-term, preventive and precautionary, anticipating the likelihood of environmental harm and thus aimed at countering potential causes of environmental harm. This is part of the appropriate policy, legal, administrative and regulatory measures that the government will have to pursue to enhance and guarantee the enjoyment of the right to a clean and healthy environment in Kenya.

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<sup>39</sup> A/CONF.151/PC/10 (1990), Bergen Ministerial Declaration on Sustainable Development in the ECE Region.

<sup>40</sup> Philippe Sands, *Principles of International Environmental Law*, op.cit; See also Patricia Birnie & Alan Boyle, *International Law and the Environment*, op.cit.

<sup>41</sup> *Hungary v. Slovakia*, 1997 WL 1168556 (I.C.J-1997)

<sup>42</sup> See generally Article 69 of the Constitution, op. cit

### **3.0 Challenges and opportunities in Realizing the Right to a Clean and Healthy Environment**

To attain the realization of the right to a clean and healthy environment in Kenya there are certain hindrances that have to be surmounted. In this section we shall discuss these challenges and propose possible reform opportunities that may be harnessed in observing, respecting, promoting and fulfilling environmental rights.

The need for public awareness on environmental rights and obligations is essential if the right to a clean and healthy environment is to be observed, respected, protected, promoted and eventually enforced through the institutional mechanisms. As Kiromba states in his article, it is indeed true that one cannot enjoy, protect, fulfill or enforce a right which he is not aware, since for a person to be able to complain about violations of the right to a clean and healthy environment, he must not only be aware of the right, but also of the mechanisms and institutions through which such right is enforced or protected.<sup>43</sup> The citizenry must therefore be educated on their rights and of the mechanisms that are available in the vindication of these rights. Civic education is also necessary if the public is to participate meaningfully in the management, protection and conservation of the environment.<sup>44</sup> This will raise awareness among the citizenry of their rights vis-à-vis their duties to protect the environment for ecological reasons.

The formulation of the right to a clean and healthy environment may pose a challenge in environmental protection. The right to a clean and healthy environment as captured in the constitution is anthropocentric. It is human-centered. The entitlement is individualistic with no corresponding duties on the right-holders to conserve and protect the environment for its intrinsic worth. It is provided that every person has the right to a clean and healthy environment including the right to have the environment protected for the benefit of present and future generations and to have obligations

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<sup>43</sup> B. Kiromba Twinomugisha, "Some Reflections on Judicial Protection of the Right to a Clean and Healthy Environment in Uganda" op.cit.

<sup>44</sup> See Article 69 (1) (d) of the Constitution., op.cit

relating to the environment fulfilled.<sup>45</sup> The right puts human beings at the fore front. The environment and its resources are to be protected through the measures contemplated therein not necessarily for its ecological value but for the benefit of human beings: the present and future generations. The environment can be protected for its own sake. Even though Article 69 addresses certain aspects of the environment this is not necessarily for purposes of protecting the natural heritage for its own sake but it is for the benefit of man. Nevertheless, Article 70 gives the court the power to make any order, or give any directions to prevent, stop or discontinue any act or omission that is harmful to the environment and to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment<sup>46</sup>. There is no guarantee here that the environment will be protected for its own sake. The same is left to the discretion of the judge who may or may not make the orders as sought. The temperament of the court, its appreciation of environmental law and practice and the kind of evidence presented before it will largely determine the orders that will be made.

Even though the state is under Article 69 obligated to do certain things with respect to the environment, Article 42 is silent on the role of individuals and other private persons in protecting the environment. The right to a clean and healthy environment under the constitution is distinguishable from section 3 of the Environmental Management and Coordination Act<sup>47</sup>. Section 3 of the said Act states that every person is entitled to a clean and healthy environment and has the duty to safeguard and enhance the environment.<sup>48</sup> Section 3 under EMCA imposes certain

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<sup>45</sup> Ibid, Article 42.

<sup>46</sup> Ibid, Article 70 (2) (a) and (b)

<sup>47</sup> Act No. 8 of 1999., op. cit

<sup>48</sup> Ibid

duties on every person to safeguard and enhance the environment. The constitution does not impose such an individualistic duty on the right-holders.

Environmental conservation and protection cannot be the preserve of the state alone. Individuals do contribute significantly in damaging the environment and should bear responsibilities too. Cullet says that the only way to achieve an effective implementation mechanism for environmental rights is to lay a duty on the holders of the rights, to participate in environmental protection as their actions may harm the environment. He argues that a duty has to be laid out first upon all individuals since environmental harm is as a result of their collective actions or inactions.<sup>49</sup> The need to impose duties on individuals and other stakeholders was emphasized in *Park View Shopping Arcade v Kangethe & 2 others* where Ojwang Ag. J (as he then was) observed that “...*Environmental conservation, by its intrinsic character, cannot be supposed to be a task for Government alone, and all citizens have a right and a duty to make an input...*”<sup>50</sup>

By giving the State the responsibility of fulfilling environmental obligations in Articles 42 and 69 of the Constitution it is not clear how civic participation in environmental issues will be achieved in Kenya. From the said Articles it is also not clear how the State will bring on board the marginalized and other private groups in decision-making yet they are the ones who are most adversely affected by environmental harm and injustices. It is not clear how, for example, the government will involve the public in decision-making and at what levels. Some of these issues will have to be legislated upon and policies passed to ensure that the public is effectively involved in decisions that are affecting them.<sup>51</sup>

To realize the right to a clean and healthy environment and at the same time safeguard the environment for its ecological reality and biological diversity the court

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<sup>49</sup> Phillippe Cullet, “Definition of an Environmental Right in a Human Rights Context”, *op. cit.*

<sup>50</sup> KLR (E&L) 1, 592

<sup>51</sup> See generally, Regulation 17 of Legal Notice No. 101, The Environmental (Impact Assessment and Audit) Regulations 2003. There will be a need to harmonize the existing laws, policies and regulations on the environment to ensure they comply with spirit of the constitution.

must play its special role as the guardian of human rights through its judgments and declarations in reaffirming the rights of the present and future generations and in pushing for the rights of the environment as envisaged in section 13 (3) of the Environment and Land Court which confers on the court the power to hear and determine applications for denial, violation or infringement of, or threat to, rights relating to the environment and land under Articles 42, 69 and 70 of the Constitution.<sup>52</sup> This role is further bolstered by the Act which in section 20 thereof confers on the court suo moto jurisdiction in environmental matters.<sup>53</sup> This is an opportunity in future efforts aimed at enforcing environmental rights not necessary for the benefit of human beings but also for the benefit of the natural resources, ecosystems and other non-human species.

In *Mbole Nzomo Anthony & 3 others Versus Shreejii Enterprises Ltd & 4 others*<sup>54</sup> the court had an opportunity to interpret Article 42 of the Constitution and section 3 of the Environmental Management and Co-ordination Act on the right to a clean and healthy environment but declined to exercise its jurisdiction noting that “...in the light of the provisions of the Constitution and the Environmental Management and Co-ordination Act, the specific subject of the environmental damage likely to flow from a sodium silicate factory established in Miritini, properly belongs, in the first place, to the jurisdiction of the National Environmental Tribunal, and only in the second place does the matter fall to the High Court’s appellate jurisdiction. So complex are the environmental issues involved, routine issuance of injunctive orders by the High Court may miss the knowledge-base regarding realities at the locus in quo. Given the binding design of Court orders, it is undesirable that these should be made without a full understanding of reality...” This is a great opportunity that the court could

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<sup>52</sup> Act No. 19 of 2011, *Op.cit.*

<sup>53</sup> *Ibid.*

<sup>54</sup> Civil Suit No.265 of 2010

have used to interpret the said sections so as to give full effect to the rights of the environment as contained in the constitution.

The judges' role as the guardians of human rights may require them to engage in judicial activism as was the case in *Peter K. Waweru versus Republic*<sup>55</sup> so as to protect the environment. In this case the court in exercising suo moto jurisdiction addressed environmental issues on its own motion and even went further to equating the right to a clean environment with the right to life. By the time the court was making this decision the people's right to a clean environment was merely a statutory right but has now received constitutional endorsement.<sup>56</sup> Towards this end judges and environmental law advocates need some training in environmental law and practice, since, as Okidi submits the judgments of the courts will depend on the cogency of the arguments by the lawyers as well as the quality and judicial temperament of the courts.<sup>57</sup>

The role of the courts in protecting environmental rights is further enhanced by the newly enacted Environment and Land Court Act which in section 20 thereof gives the court suo moto jurisdiction. It is arguable that this section allows judges to engage in judicial activism to safeguard the environmental rights in Article 42 and also gives them an opportunity to interpret these rights in ecocentric terms using the devices envisaged in Article 159 of the Constitution. Article 159 of the Constitution requires the courts and tribunals to ensure that justice is done to all irrespective of status<sup>58</sup>, justice is not delayed, that alternative forms of conflict management such as mediation are promoted, that justice is administered without undue regard to procedural

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<sup>55</sup> [2006]eKLR

<sup>56</sup> See Article 42 of the Constitution of Kenya 2010, op. cit.

<sup>57</sup> Okidi, C.O., "The Practice and Principles in Environmental Law for Kenya", (A Paper prepared for the KNAS/IDRC Public Lectures at the Kenya National Academy of Sciences, 1996), p. 13

<sup>58</sup> Ibid., see also Article 48 of the Constitution providing that the State shall ensure access to justice for all persons and, if a fee is required, it shall be reasonable and shall not impede access to justice.



technicalities and that the spirit of the constitution is promoted and protected.<sup>59</sup> In enforcing environmental rights an applicant will not have to demonstrate that any person has incurred loss or suffered injury. This is indeed an opportunity in the enforcement of the right to a clean and healthy environment as more people can now access the courts.

The promotion of alternative forms of conflict management such as mediation will also enhance environmental governance.<sup>60</sup> Mechanisms such as mediation give the parties in dispute autonomy over the dispute resolution process and over the outcome. They are also flexible, cost-effective and expeditious. These conflict management mechanisms will enhance access to justice and encourage public participation in environmental governance as they address the underlying causes of conflicts as opposed to merely settling some of the root causes of a conflict.<sup>61</sup>

In some jurisdictions such as India and Uganda courts have made significant contributions in environmental governance. Courts in Kenya may opt to borrow from these jurisdictions. This has been possible since the Indian Constitution enables the Indian courts to play a proactive role in environmental matters and exercise jurisdiction suo moto or through public interest litigation. For instance, the Indian Supreme Court has equated the right to a clean environment with the right to life.<sup>62</sup>

Since environmental rights are collective and solidarity rights there will be need for the State, other organizations such as NGOs and the individuals to co-operate in providing the necessary resources, skills and technology so as to protect and safeguard environmental rights. For example in *Peter K. Waweru versus Republic (supra)* the court

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<sup>59</sup> Ibid, Article 159 (2).

<sup>60</sup> Ibid

<sup>61</sup> See generally, Kariuki Muigua, "*Resolving Environmental Conflicts through Mediation in Kenya*", [Unpublished Doctoral thesis, 2011]

<sup>62</sup> See Bakshi Pradeep & Yadav Madhur, *New Judicial Roles and Green Courts in India*, available at: [http://inece.org/conference/9/papers/Bakshi\\_India\\_Final.pdf](http://inece.org/conference/9/papers/Bakshi_India_Final.pdf). (Accessed on 03/02/2012)

found that the right to a clean and healthy environment of the users of the water downstream was threatened by raw sewage or waste water and further posed a serious threat to the water table in terms of pollution. The decision thus addressed ecocentric concerns and the needs of the users of the water downstream not as individuals but collectively. Moreover in the Philippines case of *Juan Antonio Oposa and others versus The Honourable Fulgencio S. Factoran and another*<sup>63</sup> the petitioners were a group of Filipino minors who brought the action on their own behalf and on behalf of generations yet unborn, through their respective parents claiming, *inter alia*, that as citizens and taxpayers they were entitled to the full benefit, use and enjoyment of “the natural resource treasure that is the country’s virgin rain forests.” The claim was based on the right to a balanced and healthful ecology which is the equivalent to the right to a clean and healthy environment in our constitution<sup>64</sup>. The interpretation that the courts will render to the right to a clean and healthy environment and the other rights touching on the environment in the constitution will to a greater extent determine the direction the environmental discourse will take in Kenya.

Some of the obligations in respect of the environment under Article 69 are not worded in anthropocentric terms. There are opportunities for utilizing it. For instance Article 69, *inter alia*, obligates the State to protect genetic resources and biological diversity<sup>65</sup>, establish systems of environmental impact assessment, environmental audit and monitoring of the environment<sup>66</sup> and the elimination of processes and activities that are likely to endanger the environment<sup>67</sup>. This is a clear chance for the government to

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<sup>63</sup> G.R. No. 101083, Supreme Court, July 30, 1993.

<sup>64</sup> Article 42 of the Constitution, *op. cit*

<sup>65</sup> *Ibid.*, Article 69 (1) (e).

<sup>66</sup> *Ibid.*, Article 69 (1) (f).

<sup>67</sup> *Ibid.*, Article 69 (1) (g).

put in place the necessary mechanisms and institutions for the protection of the environment for ecological reasons.

#### **4.0 Conclusion**

In the paper the authors have argued that the constitutionalisation of the right to a clean and healthy environment is a welcome move as it confers on these rights a constitutional status thus elevating environmental rights beyond the vicissitudes of everyday politics. With the right to clean and healthy environment firmly embedded in the supreme law of the land there will be greater protection of environmental rights. Enforcement mechanisms for seeking redress for environmental harm are now stronger for and enhanced further by procedural rights such as access to justice, access to information and public participation and also the vexing question of showing *locus standi* is now a thing of the past. Safeguarding environmental rights in Kenya is now feasible with the constitutionalisation of the right to a clean and healthy environment, procedural rights and with the enhanced role of the courts.

However, the writers caution that the right to a clean and healthy environment evinced in the constitution is shrouded with anthropocentric concerns and may be construed as not sufficient in the protection of natural resources, ecosystems and other non-human species for their ecological and intrinsic value. The said right also fails to outline explicitly the duties of the right-holders in protecting the environment. Nevertheless, it is hoped that with the special role bestowed on the judiciary there will emanate from the courts, judgments, rulings and declarations that will be useful in developing environmental jurisprudence in Kenya; help in passing environmental laws, regulations and policies that will address existing challenges or inconsistencies in the laws and also address both the ecocentric and anthropocentric views so as to achieve sustainable development. There are also great opportunities in the constitution, such as those contemplated in Article 69 of the constitution, which the government may use to

put in place mechanisms and institutions so as to protect the environment for its own sake.